IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
v.	)	
	)	Crim. App. Dkt. No. 20130309
Specialist (E-4) **ERIC L. RAPERT,** United States Army, Appellant	)	USCA Dkt. No. 15-0476/AR

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Issue Presented

WHETHER THE FINDING OF GUILTY FOR CHARGE I AND ITS SPECIFICATION FOR COMMUNICATING A THREAT IS LEGALLY INSUFFICIENT BECAUSE THE COMMENTS ARE CONSTITUTIONALLY PROTECTED AND DO NOT CONSTITUTE A THREAT UNDER THE TOTALITY OF THE CIRCUMSTANCES AND IN LIGHT OF THE SUPREME COURT'S DECISION IN *ELONIS v. UNITED STATES*, 135 S. Ct. 2001 (2015).

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On March 26, 2013, Specialist (SPC) Eric L. Rapert (appellant) was tried at Wheeler Army Airfield, Hawaii, before a military judge sitting as a special court-martial. Pursuant to his pleas, SPC Rapert was convicted of violating a lawful general order in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2012). Contrary to his pleas, SPC Rapert was convicted of committing a lewd act with a child, assault of a child consummated by battery, and wrongfully communicating a threat in violation of Articles 120(b), 128, and 134, UCMJ, 10 U.S.C. §§ 920(b), 928, and 934 (2012). Specialist Rapert was sentenced to reduction to E-1, confinement for six months, and a bad conduct discharge. On July 25, 2013, the convening authority approved the sentence as adjudged.

On February 2, 2015, the Army Court affirmed the findings and the sentence. (JA 1). In accordance with Rule 19 of this Court's Rules of Practice and Procedure, Specialist Rapert was notified of the Army Court's decision and subsequently petitioned this Court for review on April 9, 2015. On July 8, 2015, this Honorable Court granted appellant's petition for review.

Statement of Facts

On November 6, 2012, the night of the presidential election, SPC Rapert and his wife attended an election night

party with friends. Mr. Keith Kilburn and his wife, SPC Tina Kilburn, hosted the gathering. (JA 66).

While watching the election results come in, SPC Rapert became increasingly concerned President Obama would be reelected. First, SPC Rapert did not believe President Obama had been productive in his first four years in office. He also did not believe President Obama would be productive in a subsequent term. (JA 18). Additionally, SPC Rapert was concerned the President's reelection would lead to more restrictive gun control laws, which SPC Rapert opposes. (JA 56). Specifically, SPC Rapert was concerned President Obama would sign a bill that would prevent him from owning an assault rifle, which SPC Rapert viewed as a violation of his Second Amendment rights. (JA 56).

In addition to these concerns for the country, Specialist Rapert was particularly upset when it appeared to him his favored candidate, Mr. Mitt Romney, would not win SPC Rapert's home state of Missouri. Specialist Rapert was confounded by the fact his home state could vote for someone other than Mr. Romney, given how important gun rights are to Missourians and the favorable rating Missouri's laws received from the National Rifle Association (NRA). (JA 17).

When the Cable News Network (CNN) concluded President Obama would be reelected, SPC Rapert was angry and upset. (JA 17-18).

After hearing the results, he went out to the porch and smoked a cigarette. Specialist Rapert then began talking about the election. (JA 18). Although it's not entirely clear from the record, it appears those present included Mr. Kilburn, SPC Rapert's wife, Ashley, and the Kilburn's neighbors, the Fuges, who happened to be outside. Mr. Kilburn testified that while outside on the porch, SPC Rapert stated:

> I can't believe that nigger won this election. He hasn't done anything in the 4 years prior and I don't feel that he's going to do anything in the 4 years upcoming. I don't think I can serve in the military another 4 years under his control. I *might* have to go back home in this upcoming training session that we're going to do for the winter and break out my KKK robe that was handed down to me by my grandfather and go put one order up and make it my last order to kill the President."

No one who heard SPC Rapert's comments contacted the authorities that night. Mr. Kilburn stated he did not contact the authorities because he did not want to negatively impact his wife's career. (JA 28). He told his wife, SPC Kilburn, about the comment and left it to her to report it to her chain of command. (JA 28).

Specialist Rapert and his wife frequently visited the Kilburn's house. (JA 22). The Fuges would often take part in these get-togethers and all three couples would typically discuss various topics while smoking on the Kilburn's back porch. (JA 22-23). Mr. Kilburn described SPC Rapert's sense of

humor during these visits as "adult oriented," and characterized it as "blue humor." (JA 23). Specialist Rapert made jokes about deviant sexual practices and his own pierced genitalia to anyone within ear shot. (JA 24).

Moreover, Mr. Kilburn knew SPC Rapert and his family had an affinity for weapons and the Second Amendment was important to SPC Rapert. In fact, he even knew what the weapons looked like because SPC Rapert showed him pictures of his and his family's weapons on Facebook. (JA 21-22). According to Mr. Kilburn, he did not know anything about weapons or the history of weapons until he met SPC Rapert. (JA 19).

An investigation uncovered no evidence SPC Rapert participated in or advocated for the Ku Klux Klan or any other extremist organization.[1] (JA 46). In his statements to criminal investigators, SPC Rapert indicated he intended the comments as "harmless jokes." (JA 66). He also stated multiple times to investigators he did not intend to harm the President and was "venting." (JA 61, 64).

At trial, Mr. Kilburn stated his subjective opinion that SPC Rapert was serious when he made his alleged threats. (JA

[1] On 18 August 2015, I attempted to view Prosecution Exhibit 10 at CAAF. Due to technical difficulties with the disc itself or with the equipment it was being played on, only a portion of SPC Rapert's interview with Special Agent Joseph Conaway could be viewed.

71). Mr. Kilburn's reason for his subjective belief was because "[he] take[s] everybody's words seriously because [he doesn't] know what you can do or what you can be capable of, such as Columbine. Who would have thought teenagers could ever kill people. Everybody's capable of killing anybody." (JA 71).

The government offered no evidence SPC Rapert's statements had any effect on the good order and discipline in the unit. On the contrary, the defense elicited testimony from SPC Kilburn, a member of SPC Rapert's unit, that the only reason she was not still friends with SPC Rapert is because the chain of command gave her a no contact order with him. Otherwise, she would have remained friends with him. (JA 38). No one from SPC Rapert's chain of command testified at his trial. Regarding the allegedly threatening statements, Mr. Kilburn testified the remarks made him feel "akward" and that it was not proper for a good Soldier to make those comments. (JA 30-31).

During closing argument, the trial counsel argued that the government did not have to prove specific intent and the that "the only thing that matters is that he made the threat, he put that out there . . . " and that Mr. Kilburn took his words at face value. (JA 69).

Summary of Argument

The Specification of Charge I is legally insufficient. First, to be guilty of communicating a threat, SPC Rapert had to

engage in more than mere negligent conduct. *See Elonis v. United States*, 135 S. Ct. 2001 (2015). Second, even if *Elonis* does not apply, SPC Rapert's speech was constitutionally protected because the evidence failed to show any direct and palpable connection between his speech and the military's mission.

Argument

WHETHER THE FINDING OF GUILTY FOR CHARGE I AND ITS SPECIFICATION FOR COMMUNICATING A THREAT IS LEGALLY INSUFFICIENT BECAUSE THE COMMENTS ARE CONSTITUTIONALLY PROTECTED AND DO NOT CONSTITUTE A THREAT UNDER THE TOTALITY OF THE CIRCUMSTANCES AND IN LIGHT OF THE SUPREME COURT'S DECISION IN *ELONIS v. UNITED STATES*, 135 S. Ct. 2001 (2015).

Standard of Review

The question presented by *Elonis* is whether communicating a threat under Article 134, UCMJ must include a mens rea with respect to the speaker's intent. This question of law is reviewed *de novo*. *United States v. Salazar*, 44 M.J. 464, 471 (C.A.A.F. 1996).

Questions of legal sufficiency are also reviewed *de novo*. *United States v. Young*, 64 M.J. 404, 407 (C.A.A.F. 2007). The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Dobson*, 63 M.J. 1, 21

(C.A.A.F. 2006) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, (1979)).

Argument

a. The finding of guilty for Charge I and Its Specification is legally insufficient in light of the Supreme Court's Decision in *Elonis*.

The issue in *Elonis* was whether 18 U.S.C. § 875(c), which criminalizes transmitting "any communication containing any threat . . . to injure the person of another" in interstate commerce, requires that a defendant intend that his communication contain a threat, and if not, whether the First Amendment requires such a showing. *Elonis*, 135 S. Ct. at 2004. Elonis posted what he claimed to be therapeutic rap lyrics on Facebook. These lyrics contained graphically violent language concerning his ex-wife, his former employer, a kindergarten class, as well as federal and state law enforcement officials. Despite Elonis' contention that he never intended for the lyrics to be threatening to the individuals concerned, Elonis' ex-wife and former boss found the posts to be threatening and contacted law enforcement. *Elonis*, 135 S. Ct. at 2005.

Without reaching the First Amendment issue, the Court held that requiring only negligence with respect to the communication of a threat is not sufficient to support a conviction under 18 U.S.C. § 875(c). The Court declined to state which mental state beyond negligence would be sufficient. In construing the

statute to contain a scienter requirement despite the omission of any such requirement in the statute itself, the Court relied upon the "basic principle" that "wrongdoing must be conscious to be criminal" and that a defendant must be "blameworthy in mind" before he can be found guilty. *Elonis*, 135 S. Ct. at 2009, citing *Morissette v. United States*, 342 U.S. 246, 250 (1952). The Court explained the "general rule" is a guilty mind is a "necessary element in the indictment and proof of every crime" even where the statute by its terms does not contain a scienter requirement. *Elonis*, 135 S. Ct. at 2009, citing *United States v. Balint*, 258 U.S. 250, 251 (1922). Such a reading is necessary to separate criminal conduct from innocent behavior. *Elonis*, 135 S. Ct. at 2011.

Like the statute at issue in *Elonis*, communicating a threat pursuant to Article 134, UCMJ does not expressly include a mens rea requirement. Similar to the instruction struck down in *Elonis*, which required only that a reasonable person foresee that the statements would be interpreted as a threat, military case law has consistently held that the government need not prove the speaker's intent in a prosecution under Article 134, UCMJ for communicating a threat. *See United States v. Humphrys*, 22 C.M.R. 96, 97 (C.M.A. 1956) ("To establish the threat, the prosecution must show that the declaration was made. However, it is not required to prove that the accused actually

entertained the stated intention."); *United States v. Gilluly*, 13 C.M.R. 458, 461 (C.M.A. 1963) (citing *Humphrys*, "The language of the declaration, not the intent locked in the mind of the declarant is the intent that establishes the offense of communicating a threat"). *Elonis* calls into question the continued viability of the military case law interpreting the offense of communicating a threat.

While the character of the military community and the military mission may sometimes result in disparate treatment between Soldiers and their civilian counterparts, the principle announced in *Elonis* is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil" and, therefore, applies in the military justice system as well. *Elonis*, 135 S. Ct at 2009, citing *Morissette*, 342 U.S. at 252. This case demonstrates precisely why the safeguards of such a requirement are needed.

Here, SPC Rapert was expressing political thoughts and engaged in hyperbole[2] to demonstrate how deeply he held his convictions. Because his hyperbolic remarks included language

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[2] Collins English Dictionary defines hyperbole as "a deliberate exaggeration used for effect." *Collins English Dictionary - Complete & Unabridged 2012 Digital Edition*, HarperCollins Publishers (1979), *available at* http://dictionary.reference.com/browse/hyperbole>.

that a listener perceived to threaten the President, he was prosecuted without the government having to show that he actually had any intent to harm the President at all. This is exactly the type of fundamental injustice the notions embraced in *Elonis* protects against. Moreover, the fact that subsequent investigations by CID and the Secret Service uncovered no evidence that SPC Rapert was affiliated with the Ku Klux Klan further demonstrates the need for an intent requirement to protect hyperbolic political speech such as SPC Rapert's comments from criminalization.

Additionally, the government presented no evidence that SPC Rapert's comments had any effect on good order or discipline in the unit and, given the context in which the statements were uttered, no such effect could reasonably be inferred. Simply uttering words perceived by the listener to be threatening cannot be the basis for criminal prosecution. Soldiers should be afforded the protections of *Elonis* like their civilian counterparts. Other punitive articles remain at the government's disposal to address speech that cannot be prosecuted as a threat, such as contemptuous language under Article 88, UCMJ; disrespectful language under Articles 89 and 91, UCMJ; and disloyal statements under Article 134, UCMJ.

b. Even if the Court declines to extend the ruling in *Elonis* to Article 134, UCMJ (communicating a threat), the finding of guilty for Charge I and Its Specification is legally insufficient because it criminalizes constitutionally protected speech.

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. However, speech in the military context may be abridged more than in the civilian context. *See Parker v. Levy*, 417 U.S. 733, 758 (1974); *United States v. Wilcox*, 66 M.J. 442, 446 (C.A.A.F. 2008).

To determine whether speech prohibited by Article 134, UCMJ, is unconstitutional, the following threshold questions must be answered: 1) "whether the speech is otherwise protected under the First Amendment," and 2) whether the government has proved the elements of an Article 134, UCMJ offense. *Wilcox*, 66 M.J. at 447. If those questions are answered in the affirmative, the Court then balances the "essential needs of the armed services and the right to speak out as a free American." *Wilcox*, 66 M.J. at 447 (quoting *United States, v. Schwimmer*, 279 U.S. 644, 654-55, (1929) (Holmes, J., dissenting)). To determine whether a conviction is warranted, the Court weighs the gravity of the effect of the speech, discounted by the improbability of its effectiveness on the audience the speaker sought to reach. *Wilcox*, 45 M.J. at 450.

Certain speech, such as dangerous speech, obscenity, or fighting words, is not protected by the First Amendment, "regardless of the military or civilian status of the speaker." *Wilcox*, 45 M.J. at 447; *see, e.g., Cohen v. California*, 403 U.S. 15, 20 (1971); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-573 (1942).

Here, the speech, on its face, does not constitute "fighting words" or "obscenity." Nor does it qualify as "dangerous speech." Speech that "tends clearly to harm responsiveness to command or to endanger loyalty, discipline, or morale" is considered "dangerous speech" in the military context and is constitutionally unprotected. *United States v. Priest*, 45 C.M.R. 338, 344 (1972). The context in which the speech is made controls the determination of whether speech is "dangerous." *Priest v. The Secretary of the Navy*, 570 F.2d 1013, 1018 (D.C. Cir. 1977)(performing a collateral review of Priest's conviction).

In 1969, during the Vietnam War, Priest, a Navy seaman, distributed a newsletter to active duty military personnel in the Pentagon that encouraged service members to resist the U.S. Government and listed the addresses of groups in Canada that would aide military deserters. The letter also explained that immigrant status was available to deserters in Canada. A subsequent issue of the newsletter Priest distributed to

Soldiers at the Pentagon urged enlisted men to refuse promotions. *Priest*, 45 C.M.R. at 340-341.

This Court found the materials Priest distributed were not protected by the First Amendment. "The papers in question were directed primarily to other members of the armed services. They expressly sought a breakdown in military discipline . . . and appealed to readers to take to the streets in violent revolution against the Government." *Id.* at 345. The Court distinguished the speech in *Priest* from a "political discussion between members of the armed forces in the privacy of their rooms or at an enlisted men's or officer's club." *Id.* at 346.

Parker v. Levy also provides this Court guidance regarding "dangerous speech" in the military context. In *Parker*, an officer and Army physician during the Vietnam War refused to obey orders to train Special Forces aide men and made public statements on the installation urging African American Soldiers to refuse orders to go to Vietnam. *Parker*, 417 U.S. at 735. In affirming Levy's conviction, the Court reasoned that, "While members of the military are not excluded from the protection granted by the First Amendment, the different character of the military mission requires a different application of those protections." *Parker*, 417 U.S. at 759. Contrasting the First Amendment rights of civilians with those of servicemembers, the Court noted, "Speech that is protected in the civil population

may nonetheless undermine effectiveness of response to command. If it does, it is constitutionally unprotected." *Id.*

Specialist Rapert's speech differs in form, forum, and substance from the type of speech that has been found to be "dangerous" and, consequently, undeserving of constitutional protection. First, unlike the speech in *Parker* or *Priest*, SPC Rapert's comments were spoken on the back porch of his friend's private residence and not on a military installation. Second, unlike the speech in *Parker* or *Priest*, SPC Rapert's comments were not directed towards servicemembers. That SPC Fuge was present and SPC Kilburn heard of the comment after-the-fact is markedly different from the defendants in *Parker* and *Priest*, who specifically sought out servicemembers. Third, SPC Rapert's comments were made immediately following the results of an election, not during the midst of a controversial war, as was the case in *Parker* and *Priest*.

Finally, as the District Court collaterally reviewing Priest's conviction stated, context determines whether speech is constitutionally protected. *Priest*, 570 F.2d at 1018. Unlike the servicemembers in *Priest* and *Parker*, who directed their speech towards Soldiers in a clear attempt to undermine the authority of the U.S. Government, SPC Rapert's comments were made in a private home, were not directed towards servicemembers, and were intermixed with his political opinions

concerning gun laws, a hot-button political issue of particular importance to SPC Rapert.

Specifically, SPC Rapert was concerned that, if reelected, President Obama would sign into law legislation preventing him from owning an assault rifle, in violation of his Second Amendment rights, an issue SPC Rapert feels strongly about. (JA 56). His comments regarding the President were a direct reflection of his disappointment with the election results and concern about his constitutional rights. The context in which SPC Rapert made his comments clearly distinguish them from the types of comments that have previously been held to be "dangerous." Under the circumstances in which this speech was uttered, it did not have the tendency to diminish discipline or morale or impede the mission.

Nor has the government proved the elements of communicating a threat as required by *Wilcox*. "Legal analysis of a threat must take into account both the words used and the surrounding circumstances." *United States v. Brown*, 65 M.J. 227, 232 (C.A.A.F. 2007). The words of the accused "are the starting point in analyzing a possible threat. But words are used in context." *Id.* As established earlier, *Elonis* requires the application of a mens rea to the speaker's intent for the offense of communicating a threat. But even pursuant to this Court's prior interpretation of the offense of communicating a

threat, the appellant cannot be guilty of the offense. "[T]he existence of a threat should be evaluated from the point of view of a reasonable [person]." *United States v. Phillips*, 42 M.J. 127, 130 (C.A.A.F. 1995) (citing *United States v. Shropshire*, 43 C.M.R. 214, 215-216 (1971)).

As the Court in *Johnson* noted, "Mere statements of political hyperbole are constitutionally protected" and do not constitute a threat. *United States v. Johnson*, 45 C.M.R. 53, 54 (C.M.A. 1972)(citing *Watts v United States*, 394 U.S. 705, 707 (1969)). Indicia of political hyperbole may include "words uttered in a political context, intertwined with the substance of political protest or criticism, or an effort at sharing ideas." *United States v. Ogren*, 54 M.J. 481, 488 (C.A.A.F. 2001)(interpreting political hyperbole within the context of 18 U.S.C. 871). This Court adopted the Supreme Court standard that political hyperbole does not constitute a threat under Article 134, UCMJ. *Johnson*, 45 C.M.R at 54 (citing *United States v. Watts*, 394 U.S. 705, 707(1969))(interpreting 18 U.S.C. § 871, prohibiting threats directed toward the President).

In *Watts*, the Supreme Court found that Watts engaged in political hyperbole when he stated during a political rally that "[i]f they ever make me carry a rifle, the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers." *Watts*, 394 U.S. at 706. Watts, an 18-year-old

boy, uttered the words while participating in a public rally against police brutality near the Washington Monument in 1966. The Court reasoned, "Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise." *Id.* at 667.

The comments by SPC Rapert are similar to those in *Watts* because they were "a kind of crude offensive method of stating a political opposition to the President." *Watts*, 394 U.S. at 706. Like Watts, SPC Rapert was participating in a political event, an evening watching and discussing the presidential election, when he uttered the words at issue. Moreover, just as Watts' allegedly threatening words to President Johnson were intermixed with his views on police brutality and racism, SPC Rapert's alleged threat was intermixed with his thoughts on President Obama's suitability for office and his position on gun laws. *Watts*, 394 U.S. at 706. (JA 17-18).

Further, those who heard Watts' comments laughed, as did Watts. *Id.* The evidence in SPC Rapert's case is void of substantive details of how those who heard SPC Rapert's comments reacted that night. The only information we do have is that Mr. Kilburn testified at trial that it made him feel "akward" and that it was not proper for a Good Soldier to make those statements. (JA 30-31). Since no one reported SPC Rapert to

the authorities that night and it appears that the investigation into the alleged threat came as a result of the investigation into other offenses SPC Rapert was suspected of committing, it is reasonable to infer the audience did not believe SPC Rapert to be genuinely threatening the President's life that night.

Finally, like Watts' statements, SPC Rapert's statements contained conditional language. On direct examination, Mr. Kilburn testified that SPC Rapert prefaced his remarks about the President by saying, "I *might* have to go back home . . . " when initially asked to repeat SPC Rapert's comments (emphasis added). (JA 18). Only in response to a leading question by the trial counsel did Mr. Kilburn respond "that's true" when the trial counsel rephrased the language to state "When I go back to Missouri . . .," recognizing the conditional language Mr. Kilburn had used in his prior testimony. (JA 21). The most accurate account of what Mr. Kilburn heard SPC Rapert say that night was revealed in Mr. Kilburn's own words. Even if the language was not conditional, it is still protected hyperbole as the purpose of hyperbole is to exaggerate for effect. Watering down the exaggeration with a condition defeats the purpose.

Given the context in which SPC Rapert's words were spoken and the reaction of the listeners, this Court cannot interpret SPC Rapert's words as anything other than hyperbole. A reasonable person would not have believed that SPC Rapert's

comments constituted a genuine threat against the president, but rather were merely SPC Raperts's crude way of expressing his political opinion. Again, the only person who actually heard SPC Rapert's comments and testified at trial was Mr. Kilburn.

Mr. Kilburn's opinion that SPC Rapert was "serious" when he spoke these words was not reasonable. First, Mr. Kilburn testified that he takes "everybody's words seriously" because anybody is capable of killing. (JA 21). There was nothing about this situation in particular that made him believe SPC Rapert was going to act on his words. Further, his failure to report the offense immediately undermines his testimony that he took the threat "seriously." Second, Mr. Kilburn knew that SPC Rapert felt deeply about weapons and the two often discussed the topic together. Finally, Mr. Kilburn observed SPC Rapert become increasingly agitated as the election results came in, culminating in angry rhetoric when President Obama was announced the victor. (JA 17). For all of these reasons, a reasonable person would have understood SPC Rapert to be engaging in political hyperbole, not making a genuine threat against the President's life.

Specialist Rapert's comments are also distinguishable from those in *Ogren*. Unlike Ogren's statements, SPC Rapert's speech was "uttered in a political context, intertwined with the substance of political protest or criticism, [and made in] an

effort at sharing ideas." *See Ogren*, 54 M.J. at 488. In *Ogren*, a Soldier in pretrial confinement said, " . . . if I could get out of here right now, I would get a gun and kill that bastard" and " . . . I'm going to blow his ******* brains out" referring to former President Bill Clinton. *Id.* at 482. The Court affirmed Ogren's conviction under 18 U.S.C. § 871, reasoning that the threats were made for no apparent political, religious, or moral reasons and constituted a "true threat" under the circumstances. *Id.* at 483.

The circumstances of SPC Rapert's remarks establish that SPC Rapert did not communicate a threat against the President. SPC Rapert's intent was to "vent." (JA 61). The severe language he used among friends, with whom he had previously discussed his passion for weapons and often used off-color humor, was a means to express his disappointment in the election and concern over his constitutional right to bear arms. It was not to convey a genuine threat to the President. Under the totality of the circumstances, SPC Rapert's comments were not a "threat" within the meaning of Article 134, UCMJ, but rather constitutionally protected political hyperbole under *Johnson* and *Watts*.

Even if this Court finds that SPC Rapert's comments were not political hyperbole, *Wilcox* requires speech to have a "direct and palpable" connection with the military mission to be

criminalized under Article 134, UCMJ. *Wilcox*, 66 M.J. at 448. There is no direct and palpable connection between SPC Rapert's speech and the military. As the Court in *Wilcox* noted, "The leading cases involving the intersection of Article 134, UCMJ, and the First Amendment have involved facts adduced at trial that showed that the appellant at least attempted to direct his speech to servicemembers." *Wilcox* 66 M.J. at 450.

Specialist Rapert's comments were not directed towards any servicemember. The record does not clearly establish that any servicemember heard SPC Rapert's statements, other than SPC Kilburn, who heard the remarks second-hand. Specialist Kilburn was apparently not disturbed by SPC Rapert's remarks, because according to her testimony, she would have remained friends with SPC Rapert if permitted to do so. (JA 38). Because this speech was not directed towards servicemembers, took place in a private residence, and the evidence did not show it had any effect on SPC Fuge, who did not testify, or SPC Kilburn, who eventually heard of it second-hand, there is no "direct and palpable" connection between the speech and the military mission.

With respect to Mr. Kilburn, he testified that his reaction to the remarks was "mixed" and that it was not proper for a Soldier to make those statements. (JA 19, 30). Additionally, he testified that he takes any threat seriously regardless of the circumstances. (JA 21). The subjective opinion of a person

who admittedly does not consider the circumstances under which the speech was uttered, one of the most important factors to consider in first amendment cases, cannot be relied upon. Further, as the Court in *Wilcox* noted, " . . . a direct and palpable connection between speech and the military mission or military environment is required for an Article 134, UCMJ, offense charged under a service discrediting theory. If such a connection were not required, the entire universe of servicemember opinions, ideas, and speech would be held to the subjective standard of what some member of the public, or even members of the public, would find offensive. And to use this standard to impose criminal sanctions under Article 134, UCMJ, would surely be both vague and overboard." *Wilcox*, 66 M.J. at 448-449. Since the government offered no evidence establishing a direct and palpable connection between the speech and the military mission or environment, "the balancing test is mooted by the legal insufficiency of the charged offense." *Wilcox*, 66 M.J. at 449.

Specialist Rapert's words were uttered among friends who were gathered at a private residence for the purpose of watching and discussing the most consequential political event in our nation, the presidential election. Throughout the night, SPC Rapert had communicated his displeasure with the way the election was going and his concern for the country and his right

to bear arms under the Second Amendment. Thus, his remarks, though distasteful and inappropriate, were not criminal.

Conclusion

Wherefore, SPC Rapert requests this Honorable Court dismiss Charge I and Its Specification.

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Defense Appellate Division
USCAAF Bar No. 26450

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Rapert*, Army Dkt. No. 20130309, USCA Dkt. No. 15-0476/AR, was electronically filed with both the Court and Government Appellate Division on August 20, 2015.

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